

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HOLLY MARIE PATTERSON,

Defendant-Appellant.

UNPUBLISHED

May 19, 2011

Nos. 290857; 299354

Macomb Circuit Court

LC No. 2008-001546-FC

Before: CAVANAGH, P.J., and TALBOT and STEPHENS, JJ.

PER CURIAM.

Holly Marie Patterson challenges her jury trial convictions and prison sentences for two counts of extortion¹ and one count each of kidnapping², unlawful imprisonment³ and conspiracy to commit extortion.⁴ Patterson was initially sentenced to concurrent prison terms of life imprisonment for the kidnapping conviction, 10 to 15 years for the unlawful imprisonment conviction, and 10-1/2 to 20 years each for the extortion and conspiracy convictions. The trial court thereafter denied Patterson's motion for a new trial, but granted her motion for resentencing and resentenced her to a term of 10-1/2 to 40 years' imprisonment for the kidnapping conviction and to the identical terms previously imposed for the remaining convictions. We affirm.

I. BACKGROUND

Patterson's convictions arise from an incident in March 2008, during which the victim was forcibly restrained and beaten during an encounter with Patterson and her boyfriend and codefendant Louis Cotoio. The prosecutor's theory at trial was that Patterson and Cotoio "cooked up a plan" to coerce the victim into reimbursing Patterson \$500 for the cost of an earlier

¹ MCL 750.213.

² MCL 750.349.

³ MCL 750.349b.

⁴ MCL 750.157a and MCL 750.213.

abortion, because Patterson believed that the victim was responsible for her pregnancy. The prosecutor presented evidence that Patterson invited the victim to her apartment and that, after arriving, the victim was forcibly restrained and beaten by Cotoio. Afterward, Patterson and Cotoio repeatedly screamed at the victim and demanded money. Patterson eventually gave the victim a telephone for him to arrange to have his brother deliver the money in exchange for the victim's release. The victim's brother agreed to bring the money to a specified location, but he also contacted the police. When Patterson arrived at the prearranged location, she was arrested and directed the officer to her nearby Jeep, where the victim was lying bound in the back seat. Cotoio was also inside the Jeep and he too was arrested.

I. DOCKET NO. 290857

Patterson first argues that a new trial is required because the trial court erroneously denied her motion to excuse a prospective juror for cause. We disagree. Because trial counsel did not exhaust all peremptory challenges and expressed satisfaction with the empanelled jury, this issue is waived.⁵ A waiver, as distinguished from forfeiture of an issue, extinguishes any error.⁶

Patterson further argues that defense counsel was ineffective for failing to either further voir dire the prospective juror to establish a proper basis for dismissal for cause, or to exercise a peremptory challenge to excuse the juror.

“[In]effective assistance of counsel is a mixed question of fact and constitutional law.”⁷ “A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel.”⁸ An appellate court reviews the trial court's findings of fact for clear error and reviews its ultimate decision whether the defendant was denied the effective assistance of counsel de novo.⁹ To establish ineffective assistance of counsel, Patterson bears the burden of showing both deficient performance and resulting prejudice.¹⁰ “[A] defendant must demonstrate that counsel's performance was deficient in that it fell below an objective standard of professional reasonableness, and that it is reasonably probable that, but for counsel's ineffective assistance, the result of the proceeding would have

⁵ *People v Jendrzewski*, 455 Mich 495, 514-515 n 19; 566 NW2d 530 (1997); *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994).

⁶ *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000).

⁷ *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

⁸ *Id.*

⁹ *Id.*

¹⁰ *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

been different.”¹¹ Patterson must also overcome a strong presumption that counsel engaged in sound trial strategy.¹²

To the extent Patterson contends that trial counsel should have conducted further voir dire of the prospective juror, her argument cannot succeed because she has not established any basis for concluding that further voir dire would have revealed additional information that would have been helpful to an evaluation of the juror’s qualifications. The burden is on Patterson to establish the factual predicate for her claim.¹³

To the extent Patterson argues that trial counsel was ineffective for not exercising a peremptory challenge to excuse the juror, she has failed to overcome the presumption of sound trial strategy. Decisions whether to challenge a juror for cause or to exercise a peremptory challenge are generally considered matters of trial strategy.¹⁴ “Perhaps the most important criteria in selecting a jury include a potential juror’s facial expressions, body language, and manner of answering questions.”¹⁵ Accordingly, this Court has been disinclined to find ineffective assistance of counsel based on counsel’s failure to challenge an allegedly biased juror.¹⁶ To find ineffective assistance of counsel, courts generally require a showing of actual bias against a defendant.¹⁷

The prospective juror admittedly held strong views against abortion, which she indicated would be in the “back of her mind.” But “[n]o person sitting as a juror can completely remove his own experiences, beliefs, and values, however hard he may try.”¹⁸ “It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.”¹⁹ Although it is well-recognized that abortion is a “particularly fertile field for preconceived notions and prejudices”²⁰, Patterson was not charged with any abortion-related crime. Rather, the abortion evidence was relevant only insofar that it served as a motivating factor for the charged crimes.

¹¹ *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

¹² *Id.* at 667-668.

¹³ *Carbin*, 463 Mich at 600.

¹⁴ *People v Robinson*, 154 Mich App 92, 95; 397 NW2d 229 (1986).

¹⁵ *People v Unger*, 278 Mich App 210, 258; 749 NW2d 272 (2008).

¹⁶ *Id.* at 257-258.

¹⁷ See *Hughes v United States*, 258 F3d 453, 458 (CA 6, 2001); see also *Miller v Webb*, 385 F3d 666, 674 (CA 6, 2004).

¹⁸ *Virgil v Dretke*, 446 F3d 598 n 49 (2006).

¹⁹ *People v Cline*, 276 Mich App 634, 641; 741 NW2d 563 (2007).

²⁰ *People v Murawski*, 2 Ill 2d 143, 147; 117 NE2d 88 (1954).

In response to further questioning by the trial court, the prospective juror unequivocally represented that she would not take the position that Patterson was guilty of “anything else,” simply because she had a prior abortion. The prospective juror also answered “I will try” when asked if her position was “I can’t unring a bell, however, I’m ready to follow the instructions and judge you fairly as I would try to judge any person fairly.” Prospective jurors often couch answers to questions concerning bias with this type of language.²¹ At a post-trial *Ginther*²² hearing, trial counsel explained that he did not excuse the juror as a matter of strategy, because he believed that the prospective juror would bend over backwards to prove that she could be objective and follow the trial court’s instructions. Counsel also stated that he conferred with Patterson, who agreed with his strategy. The trial court found that defense counsel’s testimony at the *Ginther* hearing was credible, and we defer to the trial court’s determinations of credibility.²³ Considering that trial counsel had the opportunity to evaluate the prospective juror’s demeanor in deciding whether to exercise a peremptory challenge, and the trial court’s finding that trial counsel’s testimony was credible, Patterson has failed to demonstrate that counsel was ineffective for not peremptorily excusing the juror and has not overcome the presumption of sound trial strategy.²⁴

Patterson next argues that the introduction at trial of statements by Cotoio to two different police officers violated her rights under the Confrontation Clause, thereby requiring a new trial. We disagree. Because Patterson did not object to the statements at trial, appellate relief is not warranted unless she demonstrates a plain error that affected her substantial rights.²⁵ If this showing is made, we exercise discretion in deciding whether to reverse.²⁶ “Reversal is warranted only when the plain, unpreserved error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant’s innocence.”²⁷

There is merit to Patterson’s claim that Cotoio’s statements to Officer Sawyer at the time of his arrest were testimonial in nature and, accordingly, were subject to exclusion.²⁸ The exclusion is applicable even where a person makes voluntary statements, so long as they are

²¹ See *Miller*, 385 F3d at 675.

²² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

²³ *People v Dagwan*, 269 Mich App 338, 342; 711 NW2d 386 (2005).

²⁴ *Unger*, 278 Mich App at 258.

²⁵ See MRE 103(a)(1); *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

²⁶ *Carines*, 460 Mich at 763.

²⁷ *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003).

²⁸ *Crawford v Washington*, 541 US 36, 59; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

testimonial in nature.²⁹ We reach this same conclusion with respect to Cotoio's written statement to Detective Christian following his arrest.

But, Patterson has failed to show that the admission of the statements affected her substantial rights. To be entitled to relief, Patterson must demonstrate that the evidence was outcome determinative.³⁰ Patterson has the burden of persuasion with respect to prejudice.³¹ The record indicates that defense counsel deliberately declined to object to the testimony regarding Cotoio's police statements as a matter of trial strategy. The defense theory at trial was that Cotoio was alone responsible for the charged crimes and that Patterson was merely present. At the *Ginther* hearing, defense counsel explained that his strategy was to mitigate Patterson's involvement and to show that there was no plan between Patterson and Cotoio. Counsel stated that wanted to call Cotoio as a witness at trial, but was unable to do so because Cotoio invoked his Fifth Amendment privilege. Counsel wanted the jury to hear Cotoio's police statements, which described his involvement in the charged offenses. Patterson likewise stated that she wanted Cotoio to testify so that he could tell the truth and further indicated that she had seen Cotoio's written statement, which she claimed was truthful. The record indicates that Cotoio's police statements were viewed by both Patterson and her attorney as supportive of the defense theory, and as containing substantive facts that Patterson wanted the jury to hear.

For these reasons, Patterson has failed to show that the introduction of Cotoio's police statements affected her substantial rights. In addition, we reject Patterson's alternative argument that defense counsel was ineffective for failing to object to Cotoio's statements. Although Patterson contends that Cotoio's statement to Officer Sawyer was critical to the prosecution establishing her involvement in the crimes, inasmuch as Cotoio mentioned that Patterson had given him the handcuffs that he placed on the victim's wrists, there was overwhelming evidence of her involvement in the criminal episode independent of Cotoio's statement. Indeed, it was undisputed that Patterson brought the victim to the prearranged meeting where the victim's brother was waiting with the police. Such evidence created significant evidentiary problems for the defense, which likely affected the strength of Cotoio's statements for defense purposes. But the mere use of weak evidence does not amount to deficient performance.³² In sum, the record clearly establishes that defense counsel declined to object to Cotoio's statements as a matter of trial strategy, and Patterson has not overcome the presumption of sound strategy.³³

²⁹ *Davis v Washington*, 547 US 813, 822 n 1; 126 S Ct 2266; 165 L Ed 2d 224 (2006).

³⁰ *Carines*, 460 Mich at 763-764.

³¹ *Jones*, 468 Mich at 356.

³² Cf. *People v Lavearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

³³ *Strickland v Washington*, 466 US 668, 691; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Patterson goes on to raise several additional ineffective assistance of counsel claims, most of which lack factual support or are not adequately argued.³⁴ She contends that counsel failed to present a viable or rational defense, but does not explain what substantial defense counsel failed to present.³⁵

Patterson complains that counsel failed to retain a DVD copy of Cotoio's "statements." Her counsel testified at the *Ginther* hearing that he reviewed the DVD recording of Cotoio's statements to Officer Sawyer before trial, thereby establishing that he was aware of the recording. Counsel's failure to call a witness or present other evidence constitutes ineffective assistance of counsel only where it deprived Patterson of a substantial defense.³⁶ Patterson fails to explain how the recording could have provided her with a substantial defense.

Patterson has not established any factual support for her claim that trial counsel failed to investigate the victim's telephone records and has not demonstrated that the telephone records would have aided her case. The burden is on Patterson to establish the factual predicate for her claim.³⁷

Patterson next argues that trial counsel was ineffective for not moving to suppress her statements to Detective Christian on the ground that she was not advised of her *Miranda*³⁸ rights before giving the statements. A police officer's failure to give a *Miranda* warning precludes the prosecution from using statements, exculpatory or inculpatory, stemming from a custodial interrogation of the defendant.³⁹ Detective Christian's trial testimony and an advice of rights form signed by Patterson indicate that she was advised of her *Miranda* rights before she gave her statements. Although Patterson testified differently at the *Ginther* hearing, the trial court did not find her testimony credible. Giving deference to the trial court's credibility determination, and because the evidence indicates that Patterson was advised of her *Miranda* rights before giving a statement, we reject this ineffective assistance of counsel claim. The record does not establish a reasonable probability that a motion to suppress would have been successful.

Although Patterson also argues that trial counsel was ineffective for failing to object at trial to the use or reference to her silence in the face of specific police questioning, the challenged testimony was elicited by defense counsel. The witness's answers were responsive to counsel's questions, and Patterson fails to explain why the questions were improper or why

³⁴ *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

³⁵ *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

³⁶ *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

³⁷ *Carbin*, 463 Mich at 600.

³⁸ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

³⁹ See *People v Vaughn*, ___ Mich App ___, ___ NW2d ___ (Docket No. 292385, issued December 28, 2010), slip op at 3, lv pending.

counsel should have objected to the witness's responsive answers. Patterson has failed to establish either that counsel's performance was deficient or any resulting prejudice.

Having reviewed the email evidence introduced by Patterson at the *Ginther* hearing, we find no basis for concluding that it could have provided her with a substantial defense to the charges. Although Patterson contends that the evidence could have at least aided the jury in evaluating the victim's credibility, defense counsel attempted to attack the victim's credibility through other means. To the extent the email evidence might also have been relevant to the victim's credibility Patterson has failed to establish a reasonable probability that it would have made a difference in the outcome of the case.⁴⁰

We also reject Patterson's claim that trial counsel was ineffective for not objecting to the victim's brother's testimony referring to a couple being killed in Troy, or to the prosecutor's closing argument based on that testimony. Contrary to Patterson's position, the testimony did not attempt to compare her to some other infamous crime or criminals.⁴¹ Rather, the victim's brother referred to this other crime in the context of explaining his state of mind during the telephone call he received regarding his brother's confinement, and to explain why he called the police. Viewed in this context, counsel's failure to object was not objectively unreasonable, nor was the testimony unduly prejudicial.

Patterson also asserts that trial counsel was ineffective for not actively cross-examining or attempting to challenge witnesses Cotoio, Officer Sawyer, and Detective Christian. First, Cotoio did not testify, so Patterson's cursory claim with respect to Cotoio is without merit. The record reflects that trial counsel did cross-examine both Officer Sawyer and Detective Christian at trial. Decisions regarding the questioning of witnesses are presumed to be matters of trial strategy.⁴² Patterson fails to explain how defense counsel should have cross-examined Officer Sawyer or Detective Christian differently at trial and, accordingly, has not overcome the presumption of sound strategy.

Patterson then contends that counsel was ineffective for failing to object to the prosecutor's ongoing misconduct, but does not identify any particular misconduct in support of this claim. Her failure to specify the factual basis for her argument precludes relief.⁴³

Although Patterson also argues that counsel was ineffective for not calling a police witness to testify regarding prior threats by the victim, she failed to offer the police officer's

⁴⁰ *Kelly*, 186 Mich App at 526.

⁴¹ See, e.g., *People v Pullins*, 145 Mich App 414, 422-423; 378 NW2d 502 (1985).

⁴² *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

⁴³ *Kelly*, 231 Mich App at 640-641.

proposed testimony at the *Ginther* hearing, or otherwise establish its admissibility. Thus, Patterson has not established the factual predicate for her claim.⁴⁴

In sum, Patterson has not established any actual errors by defense counsel, whether considered singularly or cumulatively, that deprived her of a fair trial.⁴⁵

III. DOCKET NO. 299354

Patterson argues that the trial court erroneously scored three offense variables used to determine the sentencing guidelines range for her kidnapping conviction. We disagree.

When scoring the sentencing guidelines, a trial “court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score.”⁴⁶ “Scoring decisions for which there is any evidence in support will be upheld.”⁴⁷ A sentencing court properly may consider evidence admitted at trial or the unchallenged contents of a presentence report to score the guidelines.⁴⁸ Any findings of fact made by the court at sentencing are reviewed for clear error.⁴⁹ Issues involving the interpretation and application of the legislative sentencing guidelines are reviewed de novo as questions of law.⁵⁰

The trial testimony describing the victim’s injuries and the victim’s testimony that he was hospitalized for three days because of the injuries he received during the offense provided ample support for the trial court’s ten-point score for offense variable (OV) 3, “[b]odily injury requiring medical treatment.”⁵¹

Next, Patterson relies on a recent decision by this Court⁵², to argue that 50 points were erroneously scored for OV 7, which considers whether a victim was subjected to “aggravated

⁴⁴ *Carbin*, 463 Mich at 600.

⁴⁵ *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995); *People v Brown*, 279 Mich App 116, 145-146; 755 NW2d 664 (2008).

⁴⁶ *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

⁴⁷ *Id.*

⁴⁸ See *People v Althoff*, 280 Mich App 524, 541; 760 NW2d 764 (2008).

⁴⁹ *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008).

⁵⁰ *People v McGraw*, 484 Mich 120, 123; 771 NW2d 655 (2009).

⁵¹ MCL 777.33(1)(e).

⁵² *People v Hunt*, ___ Mich App ___, ___ NW2d ___ (Docket No. 292639, issued October 19, 2010).

physical abuse.”⁵³ This Court held that a trial court’s scoring of OV 7 must be based on a defendant’s actual participation in the offense.⁵⁴ But this does not preclude a court from considering whether the defendant encouraged or assisted the actions of a codefendant.⁵⁵ The evidence showed that Patterson was an active participant in restraining the victim and acted in concert with Cotoio in screaming at the victim to increase his fear and anxiety during the kidnapping. It is immaterial whether Cotoio was the person who threatened to dump the victim in the woods, as the encouragement and assistance provided by Patterson was sufficient to support the trial court’s 50-point score for OV 7.

Lastly, the trial court was permitted to consider the entire criminal transaction in determining whether defendant was a leader for purposes of OV 14.⁵⁶ While the evidence established that Cotoio was the person who applied the physical force against the victim, it was Patterson who played the lead role in arranging for the victim’s brother to pay \$500 for the victim’s release. The record supports the trial court’s decision to score ten points for OV 14. The court reasonably concluded that Patterson was the “brains” of the kidnapping offense.

Because Patterson has not established any scoring error, and she was sentenced within the appropriate guidelines range for the kidnapping conviction,⁵⁷ we are required to affirm her sentences absent a constitutional error.⁵⁸ Patterson’s reliance on the former “shocks the conscious” standard⁵⁹ is misplaced because that standard has been overruled.⁶⁰

The record does not support Patterson’s claim that the trial court improperly punished her for failing to admit her guilt. Patterson did not raise this issue at either her original sentencing hearing or at resentencing, leaving the issue unpreserved. We review unpreserved claims of sentencing error for plain error affecting substantial rights.⁶¹ “A sentencing court cannot, in whole or in part, base its sentence on a defendant’s refusal to admit guilt” or punish a defendant

⁵³ MCL 777.37.

⁵⁴ *Hunt*, slip op at 5.

⁵⁵ *People v Kegler*, 268 Mich App 187, 189-191; 706 NW2d 744 (2005).

⁵⁶ MCL 777.44(2)(a); *McGraw*, 484 Mich at 127.

⁵⁷ Contrary to what Patterson suggests, the trial court was only required to compute the guidelines for kidnapping, the crime with the highest crime class. MCL 771.14(2)(e); *People v Mack*, 265 Mich App 122, 127-128; 695 NW2d 342 (2005).

⁵⁸ *People v Conley*, 270 Mich App 301, 316-317; 715 NW2d 377 (2006); MCL 769.34(10).

⁵⁹ *People v Coles*, 417 Mich 523, 550; 339 NW2d 440 (1983).

⁶⁰ *People v Milbourn*, 435 Mich 630, 635; 461 NW2d 1 (1990).

⁶¹ *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004).

for exercising his or her right to a trial.⁶² Factors to consider in determining whether a sentence was improperly influenced by a defendant's refusal to admit guilt include "(1) the defendant's maintenance of innocence after conviction, (2) the judge's attempt to get the defendant to admit guilt, and (3) the appearance that had the defendant affirmatively admitted guilt, his sentence would not have been so severe."⁶³ Patterson has not cited any factual support for her claim that she was punished for not admitting guilt. The record discloses that although Cotoio pleaded no contest in exchange for an agreement that he would not receive a minimum sentence greater than five years, Patterson rejected a similar plea offer. Neither Patterson's decision nor the manner in which the trial court scored the guidelines after her trial is sufficient to establish a plain error. We find no basis for resentencing.

Lastly, Patterson has not established a constitutional error based on *Blakely*⁶⁴, wherein the Supreme Court held that facts that increase the maximum penalty for a crime must be proven beyond a reasonable doubt or admitted by the defendant.⁶⁵ Our Supreme Court reaffirmed that *Blakely* does not apply to Michigan's indeterminate sentencing scheme, in which a defendant's maximum sentence is set by statute and the sentencing guidelines affect only the minimum sentence.⁶⁶ Patterson has failed to establish any constitutional error.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael J. Talbot
/s/ Cynthia Diane Stephens

⁶² *People v Jackson*, 474 Mich 996; 707 NW2d 597 (2006).

⁶³ *People v Wesley*, 428 Mich 708, 713; 411 NW2d 159 (1987); see also *People v Payne*, 285 Mich App 181, 193-194; 774 NW2d 714 (2009).

⁶⁴ *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

⁶⁵ *Id.* at 303; see also *People v McCuller*, 479 Mich 672, 681; 739 NW2d 563 (2007).

⁶⁶ *People v Harper*, 479 Mich 599, 615; 739 NW2d 523 (2007); see also *McCuller*, 479 Mich at 683.